Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-928

EDWARD EUGENE BASKETT,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

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TOPICAL INDEX

	Page
Table of Authorities	ii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	27
APPENDIX A	
JUDGMENT OF THE SUPERIOR COURT	
APPENDIX B	
PETITION FOR REHEARING DENIED	
APPENDIX C	C-1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	C-1
APPENDIX D	D-1
ADVERTISEMENTS FROM THE LOS ANGELES FREE PRESS, JULY 23, 1971	D-1

TABLE OF AUTHORITIES

Cases	Page
Buchanan v. Batchelor 308 F.Supp. 729 (N.D. Tex. 1970)	16
Cohen v. United States ___U.S.___ 91 S.Ct. 1780 (1971)	15, 18
Connally v. General Construction Co. 269 U.S. 385 46 S.Ct. 126 (1926)	10
Giaccio v. Pennsylvania 382 U.S. 399 86 S.Ct. 518 (1966)	11, 14
Ginzberg v. United States 348 U.S. 463 86 S.Ct. 942 (1966)	25
Greene v. United States ___F.2d___ (9th Cir. November 23, 1971)	24
Griswold v. Connecticut 381 U.S. 479 85 S.Ct. 1678 (1965)	16
In re Lane 58 Cal.2d 99 22 Cal.Rptr. 857 (1962)	13
Lanzetta v. New Jersey 306 U.S. 451 59 S.Ct. 618 (1939)	10

Page

In re McQue (1908)
7 Cal.App. 765, 96 Pac. 110 12

Morrison v. State Board of
Education, 1 Cal.3d 214
82 Cal.Rptr. 175 (1969) 15

People v. Arcega
49 Cal.App. 239
193 Pac. 264 (1920) 14

People v. Babb
103 Cal.App.2d 326
229 P.2d 843 (1951) 12

People v. Bayside Land Co.
48 Cal.App. 257,
191 Pac. 995 (1920) 14

People v. Deibert
117 Cal.App.2d 410
256 P.2d 355 (1953) 13

People v. Dudley
250 Cal.App.2d Supp 955
58 Cal.Rptr. 557 (1967) 25

People v. Jaurequi
142 Cal.App.2d 555
298 P.2d 896 (1956) 13

People v. Scott
113 Cal.App. Supp 778
296 Pac. 601 (1931) 12

Sherman v. United States
356 U.S. 369
78 S.Ct. 819 (1958) 24

	Page
Stanley v. Georgia 394 U.S. 557 89 S.Ct. 1243 (1969)	16
Street v. New York 394 U.S. 576 89 S.Ct. 1354 (1969)	21
Stromberg v. California 283 U.S. 359 51 S.Ct. 532 (1931)	21
Thomas v. Collins 323 U.S. 516 65 S.Ct. 315 (1945)	21
Thompson v. City of Louisville 362 U.S. 199 80 S.Ct. 624 (1960)	20
United States v. Cardiff 344 U.S. 174 73 S.Ct. 189 (1952)	10
Wright v. Georgia 373 U.S. 284 83 S.Ct. 1240 (1963)	10

Statutes

California Penal Code	
§269(b)	13
§647(a)	2-5, 7, 8, 11, 14, 15, 17, 19, 24

	Page
California Penal Code	
§1118	8
28 U.S.C. §1257(3)	3

Constitution

United States Constitution	
First Amendment	3, 5, 17
Fourteenth Amendment	3, 5

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STATE OF CALIFORNIA

Petitioner, EDWARD EUGENE BASKETT, respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court, County of Los Angeles, State of California, entered in this proceeding on October 1, 1971.

OPINIONS BELOW

No written opinion was rendered by the court below, the Appellate Department of the Superior Court, County of Los Angeles, State of California, and no written opinion was rendered by the Municipal Court for the Long Beach Judicial District, County of Los Angeles, State of California, the trial court.

JURISDICTION

The judgment of the court below was entered on October 1, 1971, affirming petitioner's conviction in the Municipal Court of the Long Beach Judicial District, County of Los Angeles, State of California, for violating California Penal Code §647(a). A copy of the postcard decision of the court below is annexed hereto as Appendix "A". A timely Petition for Rehearing or in the alternative, for certification to the Court of Appeal for the State of California was filed. On October 19, 1971, the Appellate Department denied the Petition for Rehearing and also denied the alternative request for certification. A

copy of the postcard decision of the court below denying rehearing and/or certification is annexed hereto as Appendix "B". The court below, therefore, became the highest court in the State of California in which a decision could be had.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether California Penal Code §647(a), as construed and applied to prohibit a "solicitation" for "sex" is vague, indefinite, uncertain and overbroad, and constitutes an impermissible abridgement of petitioner's right to freedom of speech and deprives petitioner of liberty and property without due process of law contrary to the First and Fourteenth Amendments to the United States Constitution.

2. Whether California Penal Code §647(a), as construed and applied to prohibit lawful conduct which is nowhere defined as a crime is vague, indefinite, uncertain and overboard, and deprives

petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution.

3. Whether a conviction resulting from a general verdict based upon two intertwined charges, one of which is unconstitutional, deprives petitioner of liberty and property without due process of law and denies to petitioner the equal protection of the law, contrary to the Fourteenth Amendment to the United States Constitution.

4. Whether petitioner's conviction based solely upon the testimony of an undercover police officer who actively sought the commission of a violation of California Penal Code §647(a) deprives petitioner of his liberty and property without due process of law and denies petitioner the equal protection of the law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution and the pertinent provisions of California Penal Code §647(a) are set forth in Appendix "C" attached hereto.

STATEMENT OF THE CASE

Petitioner was arrested in the privacy of his own automobile at approximately 2:00 A.M. on March 27, 1971. The arrest was made by David James Lundberg, a Long Beach police officer, assigned to the Vice Division, working in plain clothes. Officer Lundberg had first seen the petitioner in Little Lucy's, a homosexual beer bar. He had gone to the bar for the express purpose of seeing if he could be solicited. He wanted to deceive people into thinking that he was not a police officer and to appear as if he were available for solicitation. His actions at the bar were designed to suggest to the petitioner that he was

available. For that reason, he had said "Hi," to the petitioner.

The officer next saw petitioner after Little Lucy's bar closed. He was walking down the street when the petitioner pulled up behind him in his automobile. Petitioner honked and offered the officer a ride, which was declined because the officer was going down to the Beach Roamer, another homosexual bar, to pick up a buddy. Petitioner said he would drop the officer off, as he was going that way. The policeman got into the car with petitioner.

Petitioner stopped his car near the Beach Roamer. He invited the officer to his apartment but the officer said he had a buddy waiting. Petitioner then placed his hand on the officer's clothing in the area of his crotch, and said "Why don't you go home with me and we'll have some sex?" Petitioner removed his hand and continued in a brief conversation with the officer. He then replaced his hand on the officer's clothing. It was at this moment that petitioner was arrested.

By complaint, petitioner was charged with a violation of California Penal Code §647(a) on or about March 27, 1971. He entered a plea of not guilty and was tried by a jury, the Honorable Ellsworth Mr. Beam, Judge of the Municipal Court for the Long Beach Judicial District, presiding. The only evidence against the petitioner was the testimony of the aforementioned Officer Lundberg. Petitioner and Officer Lundberg testified for the defense.

The jury found petitioner guilty of the offense charged, to wit, a violation of Penal Code §647(a). Petitioner was placed on summary probation for a period of one year, and ordered to pay a fine of $150.00 plus a penalty assessment of $40.00.

The constitutional issues here raised were first raised before trial on petitioner's motion to require respondent to elect which crime contained within California Penal Code §647(a) they were proceeding on: "Soliciting to engage in lewd conduct," or "engaging in lewd conduct." The constitutional issues were

again raised at the close of respondent's case by petitioner's Motion for Judgment of Acquittal pursuant to California Penal Code §1118, and upon a renewed motion to have the respondent elect which crime contained within Penal Code §647(a) respondent had attempted to prove. The same constitutional issues were briefed and argued at each succeeding proceeding in this case.

The Appellate Department, in affirming petitioner's conviction without opinion, by implication decided that California Penal Code §647(a) adequately defines criminal conduct although "lewd" is nowhere defined nor is it limited to particular conduct specifically proscribed by other criminal statutes. The court below also, by implication, held that it is illegal to utter words which "solicit" lawful conduct in a lawful manner. The court below rejected the long-standing rule of this Court that where it cannot be ascertained whether a conviction rests upon a valid or an unconstitutional charge, the conviction cannot stand. By its decision the court below also approved police conduct

designed to create rather than to control crime.

REASONS FOR GRANTING THE WRIT

The court below has decided Federal questions of substance not heretofore determined by this Court, and decided the Federal questions in a way not in accord with applicable decisions of this Court.

1. This Court has often reiterated that due process of law requires a penal statute to have a reasonable degree of certainty. It has warned that:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the

first essential of due process of law.'" Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618 (1939).

See also: Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240 (1963); Connally v. General Construction Company, 269 U.S. 385, 46 S.Ct. 126 (1926).

Certainty and definiteness of a criminal statute is an imperative necessity to insure the rule of law, and not the rule of man. An individual must be warned, in clear and explicit terms, that he is about to run aroul of the law.

"The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid, cf. United States v. L. Cohen Grocery Company, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, may be as much of a trap for the innocent as the ancient laws of Caligula." United States v. Cardiff, 344 U.S. 174, 190, 73 S.Ct. 189 (1952).

And courts and juries may not be free to render their verdicts on the basis of subjective predilections, suspicions and conjectures.

> "Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This State Act as written does not even begin to meet this constitutional requirement." Giaccio v. Pennsylvania, 382 U.S. 399, 403, 86 S.Ct. 518 (1966).

The decision below violates this fundamental due process precept. Demonstrably, California Penal Code §647(a) is vague, indefinite, uncertain and overbroad and fails to meet the

constitutional standard of specificity. The section provides that any person who commits the following act is guilty of disorderly conduct, a misdemeanor: "Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to the public view." Neither the term "lewd" nor the term "dissolute" is defined in the statute and the words are used interchangeably by the courts. See, e.g., People v. Babb, 103 Cal.App.2d 326, 229 P.2d 843 (1951). No other Penal Code section defines lewd or dissolute, and courts are free to give the term any definition they choose. In a 1908 case, In re McQue, 7 Cal.App. 765, 96 Pac. 110, it was held that "lewdness" meant "unlawful indulgence of lust, whether in public or private or any practice or tendency which, as shown by experience, is to weaken or corrupt the morals of those who follow it." See also People v. Scott, 113 Cal.App.Supp. 778, 296 Pac. 601 (1931). This old definition gives neither a warning to the unwary, nor a

standard for courts and juries. Were it followed, many people might find that "as shown by experience", adultery, or simple fornication out of wedlock is lewd conduct because it tends to weaken or corrupt the morals of those who follow the practice. Yet, under California law, neither simple fornication nor adultery without cohabitation is a crime. In re Lane, 58 Cal.2d 99, 22 Cal.Rptr. 857 (1962); California Penal Code §269(b).

In People v. Deibert, 117 Cal.App. 2d 410, 256 P.2d 355 (1953), a California Court held that serving drinks to minors constituted dissolute conduct. There, dissolute was defined as "loose in morals and conduct, wanton, lewd and debauched." In People v. Jauregui, 142 Cal.App.2d 555, 298 P.2d 896 (1956) "dissolute" was defined as indifferent to moral restraints, given over to dissipation or vicious course. The definition was applied to a situation involving possession of narcotics.

In two cases decided in 1920, keeping a place where assignations were encouraged was considered to be lewd. There, the court held that "lewdness is

of much broader significance than [assignation and prostitution] but includes their meaning as well as all other immoral or degenerate conduct or conversation between persons of opposite sexes." People v. Bayside Land Company, 48 Cal. App. 257, 191 Pac. 995 (1920); People v. Arcega, 49 Cal.App.239, 193 Pac. 264 (1920). None of the definitions created by State court interpretations has provided standards and guides which give the words "lewd" and "dissolute" as used in California Penal Code §647(a) a definite and certain meaning.

> "All of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power. . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is." Giaccio v. Pennsylvania, supra, 389 U.S. at 403.

In petitioner's case, the trial court instructed the jury that "lewd" is "indecent, lustful, unchaste, lascivious."

The definition the court gave for "dissolute" was "loose in morals or conduct, wanton, lewd or debauched." This is a patently vague standard which cannot define a crime. It permitted the jury to consider the critical issue upon its own notions of propriety. If the underlying social policy here involved is to be vindicated, if there is to be strict adherence to the rule of law, then a conviction for lewd conduct which is predicated upon individual concepts of morality must not be sustained. For, as the California Supreme Court said in Morrison v. State Board of Education, 1 Cal.3d 214, 226, 82 Cal.Rptr. 175 (1969), "'[T]oday's morals may be tomorrow's ancient and absurd customs.'"

2. Penal Code §647(a) creates an impermissible restraint upon free speech. This Court has repeatedly held that the communication of an idea, whether cast in the guise of a writing or "conduct", which is nothing more than communication, is constitutionally protected. See Cohen v. United States, ____U.S.____, 91 S.Ct. 1780 (1971). The mere suggestion that it may be desirable to have

"sex" cannot be converted into a crime and stripped of its constitutional protection by the talismanic label "solicitation for lewd conduct." In the area of communications relating to sexual conduct, the constitutional mandate in favor of free expression is becoming increasingly significant. This Court has more and more recognized that the number of rights encompassed by the First Amendment gives constitutional protection to a variety of private behavior. Cf. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965); Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 (1969). Additionally, there is an everchanging standard with reference to private, consensual sex-related conduct which is also entitled to constitutional protection. E.G., Buchanan v. Batchelor, 308 F.Supp. 729 (N.D. Tex. 1970). Because there is an ever-widening circle of private conduct which is protected, social policy dictates that there must be an ever-widening area of protection for speech which "solicits" that conduct. And, where the "solicitation" is in writing, in the

public press, it appears that it is indeed protected. See, e.g., advertisements which appeared in the Los Angeles Free Press, July 23, 1971, annexed hereto as Appendix "D". Equal protection requires the same freedom for identical speech:

Penal Code §647(a) which, on its face prohibits all solicitation for "lewd or dissolute" conduct, and which as construed and applied herein to prohibit solicitation for "sex", is contrary to the rights protected by the First Amendment as explicated in the above-cited cases.

The statute is particularly offensive to First Amendment guarantees because, as construed by the California Courts, it prohibits solicitation for private consensual conduct. Such a construction forecloses upon all public communication of ideas which are a part of the changing mores of our society. This Court has criticized such a niggardly construction of the Constitution.

> "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is

designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See Whitney v. California, 274 U.S. 357, 375 to 377, 47 S.Ct. 641, 648-649, 71 L.Ed. 1095 (1927) (concurring opinion of Brandeis, J.)." Cohen v. California, supra, 91 S.Ct. at 1787-1788.

3. The verdict affirmed by the Court below impermissibly permits, it is submitted, a criminal conviction which rests upon two intertwined charges, one of which is unconstitutional. California

Penal Code §647(a) contains within it at least two distinct crimes: (1) soliciting to engage in lewd conduct, and (2) engaging in lewd conduct. Despite continued efforts by the Petitioner to compel an election of charges, the case went to the jury on the theory that Petitioner could be convicted of either soliciting or engaging in lewd conduct, without regard to distinctions between the crimes. The verdict rendered by the jury was a general one and did not differentiate between the two crimes, either.

Not only is the solicitation charge unconstitutional because its use of the word "lewd" is unconstitutionally vague, but the record is devoid of evidence of solicitation to engage in "lewd" conduct, no matter what unlawful act the word is construed to encompass. The totality of evidence of solitication consists of a purported offer by the Petitioner to go to his residence for some "sex". Whatever lewd conduct may be, it is submitted, it is not merely "sex". Sex encompasses the widest range of activities from illegal acts, homosexual as well as heterosexual, to

absolutely innocent marital relations. Consequently, "sex", including, without differentiation, innocent lawful sexual conduct, cannot be equated with "lewd". Hence, Petitioner's conviction cannot validly rest upon the charge of solicitation for lewd conduct. That is the only evidence of "solicitation" here involved. A conviction based upon that charge would be without evidentiary support and would do violence to constitutional guarantees of due process of law. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960). Such was Petitioner's conviction, affirmed by the Court below. The trial court refused to distinguish between solicitation and conduct, allowing the jury to render the general verdict of "guilty". The conviction, based in part at least upon the unconstitutional charge, ignores the constitutional mandate.

> "We take the rationale of Thomas to be that when a single count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally

protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together.

* * * *

"[W]e are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects."

Street v. New York, 394 U.S. 576, 588, 594, 89 S.Ct. 1354 (1969).

See also, Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 (1945); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931).

Under the circumstances here presented, the procedures leading to the return of a general verdict were constitutionally deficient, requiring the judgment to be set aside in order to vindicate Petitioner's constitutional rights.

4. There is today a great hue and cry for "law and order". This Court daily is called upon to interpret the Constitution in such a manner as to discourage criminal behavior and to encourage compliance with the law. It is submitted that the public policy is ill served when police are encouraged to create, rather than to discover crime. Petitioner's conviction presents such a case.

The undisputed record below is that Officer Lundberg, in plain clothes, went to a homosexual bar. By his own admission he went there for the purpose of being solicited. To effectuate his ends he tried to appear available. For the same reason he greeted Petitioner. Long before any alleged crime had been committed by Petitioner, the police officer got into Petitioner's car solely in order to subject himself to what he hoped would be illegal advances. The police officer never attempted to discourage crime by disabusing the Petitioner of his possible interest in a relationship with him. And the police officer at no

time acted as an observer, attempting to ferret out illegal conduct. At all times the officer tried to elicit from the Petitioner a solicitation and/or some overt unlawful action. The officer's role, thus, was one of creating crime rather than enforcing the laws condemning it. Such police conduct saps the vitality of the law and undermines public policy:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order

that they may prosecute.' 287 U.S. at page 442, 53 S.Ct. at page 212. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."

Sherman v. United States, 356 U.S. 369, 372, 78 S.Ct. 819 (1958).

See also, Greene v. United States, ____ F.2d____(9th Cir. November 23, 1971).

The holding of the Court below applauds Governmental involvement in the creation of crime. Not only does this contravene the general interest of the Courts and the public, it is contrary to the avowed policy underlying California Penal Code §647(a). California Courts have held that the legislative enactment was intended to protect "innocent bystanders, be they men, women or children, [from] the public blandishment of deviates. . . . [And from] the open,

flagrant and to decent people, disgusting solicitations of sexual activity which have occurred on the public streets of some of our cities." People v. Dudley, 250 Cal.App.2d Supp. 955, 58 Cal.Rptr. 557, 559 (1967). There was no element of thrusting upon the public in this case, and the case was not tried upon such a theory. The police action here served no useful policy. Cf. Ginzberg v. United States, 348 U.S. 463, 86 S.Ct. 942 (1966). The public does not go to a homosexual bar with the purpose of being solicited. The public does not make itself available to advances. In short, the public does not do what the police officer did to Petitioner. His conduct far exceeded the acts of an innocent bystander and as a matter of fact and policy resulted in the Governmental creation of criminal conduct.

The affront to the public interest was enhanced in this case because the very police officer who created the crime was the sole witness to it. The scriptures warn against convictions based upon such evidence:

"A single witness shall not prevail against a man for any crime or for any wrong in connection with any offense that he has committed; only on the evidence of two witnesses, or of three witnesses shall a charge be sustained."

Deuteronomy 19:15.

"This is the third time I am coming to you. Any charge must be sustained by the evidence of two or three witnesses."

II Corinthians 13:1.

If the underlying social policy of law enforcement is to be vindicated; if criminal conduct is to be condemned and not encouraged, an innocent person should not be held guilty for a "crime" testified to by the police officer who created it.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

Respectfully submitted,

ALAN SALTZMAN and
MARTHA GOLDIN

By: MARTHA GOLDIN

Attorneys for Petitioner

Appellate Department

SUI :OR COURT, LOS ANGELES COUNTY. \LIFORNIA

No. CR A 10499

People vs. Baskett

Judgment a[illegible]r in the above entitled appeal is affirmed.

Judgment filed.

Date Oct. 1, 1971

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By R. Hunt Deputy

76N398 Cals 8-70

Los Angeles, Calif. Oct. 19 19 71

CR A 10499 PEOPLE vs BASKETT

Petiton for rehearing/certification denied. Order filed.

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By R. Hunt Deputy

70M42 Cal. 9-70

APPENDIX C.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

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1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code §647(a) provides in pertinent part as follows:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to the public view."

APPENDIX D

APPENDIX D

ADVERTISEMENTS FROM THE LOS ANGELES FREE PRESS, JULY 23, 1971

"ORANGE COUNTY GIRLS

Want good clean sex - no strings? I'm w/m. age 27. Write me for day occas. Eve sex at PO Box 63, Anaheim. Cal 92805."

"Groovy guy. 28. prof type. tall & tan. & handsm. but married. looking for gal. mar or sgl. object good times & sex. Not looking for marriage. just affair that will last if chemistry is right. Unusual condition at home forces search phone & pic if poss. no hookers. Bx 1181. Torrance. Cal 90505."

"WHERE IS SHE?

The woman that wants to have her climax done with a Fr oral expert any length of time day or night am w/m. 6' 3", 160 lbs, send fone to Box 45161, LA 90045."

"TALL WOMAN

W/M, age 55. 6 ft 4 tall.
writer. seeks tall woman for occasional sex and lasting friendship. discreet if mar. Box 29033. Vermont Sta. Los Angeles 90029."

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-928

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT COUNTY OF LOS ANGELES STATE OF CALIFORNIA

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TOPICAL INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Argument	
I	
California's Penal Code Section 647(a) is not vague, indefinite, uncertain and overbroad constituting an impermissible abridgement of speech.	5
II	
California Penal Code Section 647(a) as construed and applied does not prohibit lawful conduct which is nowhere defined as a crime.	10
III	
Petitioner's conviction was not based upon two intertwined charges, one of which is unconstitutional.	11
IV	
Officer Lundberg did not actively seek to have petitioner violate California Penal Code Section 647(a).	12
V	
The testimony of one witness is sufficient for the proof of any fact.	14
Conclusion	14
Appendixes	1a

TABLE OF AUTHORITIES CITED

Cases

	Page
American Civil Liberties Union v. Board of Education, 59 Cal. 2d 203	7
Boyce Motor Lines v. United States, 342 U.S. 337	6
In re Bushman, 1 Cal. 3d 767	9
In re De La O, 59 Cal. 2d 128	6, 11
In re Huddleson, 229 Cal. App. 2d 618	6, 7
In re McCue, 7 Cal. App. 765	8
In re Steinke, 2 Cal. App. 3d 569	9
Nash v. U.S. 299 U.S. 373	7
Patton v. La Bree, 60 Cal. 2d 606	5
People v. Babb, 103 CA. 2d 326	8
People v. D'Agostina, 190 Cal. App. 2d 447	13
People v. Dudley, 250 Cal. App. 2d Supp. 955	9
People v. Loignon, 160 CA 2d 412	8
People v. Vaughn, 196 Cal. App. 2d 622	7
People v. Victor, 62 Cal. 2d 780	6, 7
People v. Whipple, 100 Cal. App. 261	10
People v. Williams, 16 Cal. App. 2d Supp. 858	11
Roth v. U. S., 354 U. S. 476	6, 9
Trensor v. Superior Court, 35 Cal. 2d 49	6
U. S. v. O'Brian, 391 U. S. 367	9
U. S. v. Petrillo, 332 U. S. 1	6
Wotton v. Bush. 41 Cal. 2d 460	7

Statutes

United States

Title 28, U.S.C. 1257(3)	2

California

California Penal Code	
Section 6	10
Section 15	10
Section 647(a)	5, 10, 12
Section 952	11

Encyclopedias

14 California Jurisprudence, 2d Criminal Law 205	13

Dictionaries

The American College Dictionary, Random House 1962 Edition	8
The American Heritage Dictionary, 1970	9

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-928

EDWARD EUGENE BASKETT,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT COUNTY OF LOS ANGELES STATE OF CALIFORNIA

Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, respectfully pray that a Writ of Certiorari not issue to review the judgment of the Appellate Department of the Superior Court, County of Los Angeles, State of California, entered in this proceeding on October 1, 1971.

OPINION BELOW

On October 1, 1971, the Appellate Department of the Superior Court of the County of Los Angeles entered an order affirming petitioner's conviction of violation

of California Penal Code Section 647(a) (soliciting or engaging in lewd conduct). A rehearing and certification to the California District Court of Appeal was denied on October 19, 1971.

JURISDICTION

Petitioners invoke jurisdiction of this Court under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

Petitioner alleges that the following questions are presented:

1. Whether California Penal Code Section 647(a), as construed and applied to prohibit a "solicitation" for "sex" is vague, indefinite, uncertain and overbroad, and constitutes an impermissible abridgment of petitioner's right to freedom of speech and deprives petitioner of liberty and property without due process of law contrary to the First and Fourteenth Amendments to the United States Constitution.

2. Whether Californa Penal Code Section 647(a), as construed and applied to prohibit lawful conduct which is nowhere defined as a crime, is vague, indefinite, uncertain and overbroad, and deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution.

3. Whether a conviction resulting from a general verdict based upon two intertwined charges, one of

which is unconstitutional, deprives petitioner of liberty and property without due process of law and denies to petitioner the equal protection of the law, contrary to the Fourteenth Amendment to the United States Consitution.

4. Whether petitioner's conviction based solely upon the testimony of an undercover police officer who actively sought the commission of a violation of California Penal Code Section 647(a) deprives petitioner of his liberty and property without due process of law and denies petitioner the equal protection of the law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States.

California Penal Code Sections 6, 15, 647(a) and 952.

California Civil Code Section 13.

California Evidence Code Section 411.

All of the above are set forth in the appendix hereto.

STATEMENT OF THE CASE

Petitioner was arrested at approximately 2:00 a.m. on March 27, 1971, in the city of Long Beach after he had placed his hand on David Lundberg's penis and asked Mr. Lundberg to accompany him home to have

some sex. Mr. Lundberg is a police officer for the city of Long Beach, and at the time of the arrest of petitioner was working as a plain-clothes vice-officer. Petitioner's case was tried before a jury commencing on May 7, 1971, completed on May 10, 1971, with the verdict of guilty being returned on May 11, 1971. The jury was polled and each juror answered that "guilty" was his or her verdict. The case was reported.

As I read petitioner's statement of the case, he would have this Court believe that officer Lundberg performed overt acts while in the bar where he first met petitioner, that would lead a homosexual to believe that he was available for solicitation and for this reason officer Lundberg said "Hi," to the petitioner. The reported testimony of officer Lundberg was that he went into the bar dressed as a "straight" individual as opposed to a "swishy" homosexual, and while in the bar remained completely passive. It is true that officer Lundberg did say "Hi" to the petitioner, but this was in response to petitioner speaking to him first. No solicitation for a lewd act or a lewd act took place in the bar.

At closing time officer Lundberg left the bar. While walking down the sidewalk to meet his brother officer, petitioner pulled alongside officer Lundberg in his vehicle and asked officer Lundberg if he wanted a ride. Officer Lundberg declined but petitioner persisted, so officer Lundberg accepted. While petitioner was driving his Volkswagen he reached down and rubbed officer Lundberg's left ankle. In response officer Lundberg moved his foot away. When Petitioner

stopped the car he placed his hand on officer Lundberg's left thigh and began to rub it and stated, "Why don't we go to my apartment? I have a nice apartment and clean sheets on my bed." Officer Lundberg told petitioner that he had a buddy waiting for him. Petitioner then put his hand on officer Lundberg's stomach and stated, "I like chubby fellows." Officer Lundberg then started to open the door at which time petitioner placed his hand on officer Lundberg's penis and scrotum through his clothing and stated, "Why don't you go home with me and we will have some sex?" Officer Lundberg responded, "What do you mean by that?" To which petitioner replied, "Well, I will do anything you want me to to. I will please you in any way I can." Petitioner, who had removed his hand from officer Lundberg's crotch area, now placed his hand back in the area of officer Lundberg's penis. At this time officer Lundberg displayed his badge and identification and placed petitioner under arrest.

ARGUMENT

I

California's Penal Code Section 647(a) Is Not Vague, Indefinite, Uncertain And Overbroad, Constituting An Impermissible Abridgment Of Speech.

There is a "presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional" *(Patton v. La Bree,* 60 Cal. 2d 606, 608-609). "Statutes must be upheld unless their unconstitutionality clearly,

positively, and unmistakenly appears" (*In re Huddleson*, 229 Cal. App. 2d 618, 621).

The Supreme Court of the United States "has consistently held that lack of precision is not itself offensive to the requirements of due process . . . [T]he Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . .' *United States v. Petrillo*, 332 U.S. 1, 7, 8. *Roth v. United States*, 354 U.S. 476, 491. "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols; most statutes must deal with untold and unforseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." *(Boyce Motor Lines v. United States*, (1952) 342 U.S. 337)

In *In re De La O*, 59 Cal. 2d 128, 153, it is said: "Words used in a statute are ordinarily to be construed according to the context and 'the approved usage is sufficiently certain if it employs words of long usage or within a common law meaning, "notwithstanding an element of degree in the definition as to which estimates might differ' " (*Trensor v. Superior Court*, (1950) 35 Cal. 2d 49, 60.). In *People v. Victor*, 62

Cal. 2d 780, 298, the court adhered to these rules, adding at page 299 that admittedly a word used in a particular statute may be "a relative one; but 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.' (*Nash v. United States*, (1913) 229 U.S. 373, 377)"

In short, the presence of an element of degree in the definition of the words used "does not of itself render the statutory language insufficiently certain to comply with due process." "Reasonable certainty is all that is required. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language." It could be upheld if its terms may be made reasonably certain by reference to other definable sources, (*American Civil Liberties Union v. Board of Education*, (1963) 59 Cal. 2d 203, 218, *People v. Victor*, 62 Cal. 2d 280, 300). "The complexities of the social problems dealt with by the legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by overrefined inquiries into the meaning of words." (*People v. Vaughn*, 196 Cal. App. 2d 622, 632.)

In considering the words used in a statute, the court is required "to read the statute in the light of the objective sought to be achieved by it as well as the evil sought to be averted. (*Wotton v. Bush*, (1953) 41 Cal. 2d 460, 467)." (*In re Huddleson*, 229 Cal. App. 2d 618, 624.)

Section 647 was enacted by the legislature in 1961 to restate the law of vagrancy in California. The former Section 647 had been the subject of criticism because it designated as criminal the "status" of being a common drunkard or a common prostitute or being known as a pickpocket, thief, burglar or confidence operator. Following the suggestion of Professor Sherry the legislature redrafted Section 647 to replace "status" crimes with "conduct" crimes.

The conduct proscribed in Section 647(a) is to ". . . solicit anyone to engage in or engage in lewd or dissolute conduct . . ." What is lewd or dissolute conduct? ". . . lewdness or dissoluteness — terms often used interchangeably but each of which applies to the unlawful indulgence of lust, whether in public or priate." *In re McCue*, (1908) 7 Ca. App. 765, 766.

While "lewd" is defined to mean lustful, libidinous, lascivious, unchaste; and "dissolute" is defined to mean loose in morals and conduct, wanton, lewd, debauched; the two terms are often used interchangeably, each applying to the unlawful indulgence in lust, whether in public or private. *People v. Babb*, (1951) 103 CA. 2d 326, *People v. Loignon*, (1958) 160 CA. 2d 412, 420.

LEWD — inclined to, characterized by, or inciting to lust or lechery . . .

DISSOLUTE — indifferent to moral restraints: given over to dissipation; licentious. *The American College Dictionary by Random House*, 1962 edition.

LEWD — licentious, lustful, obscene.

DISSOLUTE — lacking in moral restraint, aban-

doned, debauched. *The American Heritage Dictionary*, 1970 edition.

Obscenity is not within the area of constitutionally protected speech or press. *Roth v. United States*, (1957) 354 U.S. 476. If obscenity is not within the area of constitutionally protected speech, solicitation to commit a lewd or dissolute act would likewise not be constitutionally protected by the 1st Amendment. Not all acts intended to express ideas or convey information are protected forms of free speech. *United States v. O'Brian*, (1968) 391 U.S. 367, 376. *In re Bushman*, 1 C. 3d 767, 773. "We cannot believe the legislature intended to subject innocent bystanders be they men, women or children, to the public blandishment of deviates . . . Nor do we feel the legislators were unaware of the open, flagrant and, to decent people, disgusting solicitations of sexual activity which have occurred on the public streets of our cities. Moreover, it is not to be forgotten that to some a homosexual proposition is inflammatory, which public utterance might well lead to a breach of the peace." *People v. Dudley*, 250 CA. 2d Supp. 955, 959 (1967), *In re Steinke*, 2 CA, 3d 569, 577 (1969). The testimony here was that Appellant placed his hand in the crotch area of the officer and stated, "Why don't you go home with me and we will have some sex." (Rep. Trans. P. 61, lines 16-18.) This is the type of conduct referred to in *People v. Dudley*, supra, conduct likely to lead to a breach of the peace and therefore not protected by the 1st Amendment. And of course the speech must be considered in the circumstances in which it was stated.

Applying these principles to the challenged language in California Penal Code Section 647(a), it cannot be said that the section is rendered unconstitutional on the theory that it is vague, indefinite, uncertain and overbroad, and constitutes an impermissible abridgment of petitioner's right to freedom of speech and deprives petitioner of liberty and property without due process of law.

II

California Penal Code Section 647(a), As Construed And Applied Does Not Prohibit Lawful Conduct Which Is Nowhere Defined As A Crime.

The language of petitioner's question assumes petitioner's conduct is lawful and not prohibited by statute. This is not the case of course. The substantive criminal law of California is entirely statutory and no act or omission is criminal or punishable as such unless, at the time of this act or omission, there is in force a valid statute or ordinance declaring the act therein defined to be punishable as a crime and prescribing a penalty for its violation. (California Penal Code, Section 6, 15; *People v. Whipple*, 100 Cal. App. 261.) California Penal Code Section 647(a) is the statute which defines as a crime and prohibits such conduct as petitioner committed against officer Lundberg.

The argument above in question I pertaining to the construction and application of California Penal Code Section 647(a) to speech would be applicable here as it pertains to conduct.

III

Petitioner's Conviction Was Not Based Upon Two Intertwined Charges, One Of Which Is Unconstitutional.

The complaint charged Appellant in the language of the statute. Section 952 of the California Penal Code provides that the charging of an offense is sufficient if the words of the enactment describing the offense or declaring the matter to be a public offense are used.

Where a defendant is charged in the language of the statute, except that the complaint is in the conjunctive rather than in the disjunctive, but is convicted of only one offense, evidence sufficient to support a finding of guilty of any one of the acts denounced by the statute is sufficient to sustain the conviction. *People v. Williams*, 16 CA. 2d Supp. 858 (1958), *In re De La O*, 59 Cal. 2d 128 (1963).

In the instant case there is sufficient evidence that petitioner did solicit officer Lundberg to engage in a lewd act and did engage in lewd conduct.

Petitioner asked officer Lundberg, "Why don't we go to my apartment? I have a nice apartment and clean sheets on the bed." This was said while rubbing officer Lundberg's left thigh. (Reporter's Transcript Page 61 lines 6 through 12.) Petitioner also asked officer Lundberg "Why don't you go home with me and we will have some sex?" During this statement petitioner had his hand in officer Lundberg's crotch area. (Reporter's Transcript, Page 61, lines 16 through

18.) When asked by officer Lundberg what petitioner meant by that statement, petitioner said "Well, I will do anything you want me to do. I will please you in any way I can." Petitioner then placed his hand back in the area of officer Lundberg's penis. (Reporter's Transcript, Page 61, lines 20 through 22.) This language of petitioner in conjunction with petitioner's conduct could be understood in no other way but that petitioner was soliciting officer Lundberg to engage in a lewd act.

There can be no question but that the conduct of petitioner described above constitutes lewd acts.

It is the People's contention that the portion of California Penal Code Section 647(a) prohibiting solicitation for a lewd act is not an impermissible abridgment of speech; therefore, this portion of the statute is constitutional as well as that portion prohibiting engaging in lewd conduct. There being only one crime charged and there being sufficient evidence to convict petitioner of both crimes prohibited by the statute, the conviction of the one crime should be sustained.

IV

Officer Lundberg Did Not Actively Seek To Have Petitioner Violate California Penal Code Section 647(a).

While petitioner never uses the word "entrapment" in arguing this question the only logical conclusion of his argument to this question is that he is trying to lead this Court to believe that he is a victim of entrapment on the part of officer Lundberg.

Entrapment has been defined as the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officers, *14 Cal. Jur.* 2d Crim. Law 205.

There is no evidence that the officer planned the offense. The officer was at a place he had every right to be when petitioner solicited and rubbed the officer in the crotch area. There is no evidence that the officer suggested that petitioner make the statements or do the acts. In what other manner could Section 647(a) be enforced? The officers activity in this case is analogous to dressing a male police officer as an elderly woman and having him walk in an area where many elderly women have been the victims of purse snatches in order to capture the criminal. If the officer's purse is snatched and the culprit apprehended, is this entrapment?

Entrapment is a positive defense, imposing on the accused the burden of showing he was induced to commit the offense for which he is on trial; where the doing of an act is a crime regardless of anyone's consent, if the criminal intent originates in the accused's mind and the offense is completed, the fact that an opportunity was furnished or that the accused was aided in the commission of the crime in order to secure evidence necessary to prosecute him therefore constitute no defense. *People v. D'Agostino*, (1961) 190 CA. 2d 447, 461.

The jury was instructed as to the law of entrapment. (Reporter's Transcript, Page 135, lines 25

through 28 and Page 136, lines 1 through 9.) The jury was also instructed as to the law regarding the testimony of an accomplice. (Reporter's Transcript, Page 134, lines 15 through 28, Page 135, lines 1 through 14.)

V

The Testimony Of One Witness Is Sufficient For The Proof Of Any Fact.

California Evidence Code Section 411 provides that the direct evidence of one witness is sufficient for proof of any fact.

CONCLUSION

Respondent submits that the issues raised by petitioner have been adequately dealt with in the courts below, therefore it is urged that a writ of certiorari be denied.

Dated April 25, 1972, Long Beach, California

Respectfully Submitted,

JAMES T. STARR
City Prosecutor of
Long Beach, California

C. T. ZEIGER
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Long Beach, California
Attorneys for Respondent

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First Amendment of the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The pertinent provisions of the California Penal Code are:

> Section 6. "No act or omission, commenced after twelve o'clock noon of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this code takes effect. Any act or omission commenced prior to that time may be inquired of,

prosecuted, and punished in the same manner as if this code had not been passed."

Section 15. "A crime or public offense is an act committed or omitted in violation of a law forbiding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy an office or honor, trust or profit in this state.

Section 647. "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor":

(a) "Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Section 952. "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any techical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words

sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

CALIFORNIA EVIDENCE CODE

Section 411. "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

CALIFORNIA CIVIL CODE

Section 13. "Words and phrases are construed according to the context and the approved usage of the langauge; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition."